AT&T Services, Inc. *and* Communications Workers of America, AFL–CIO, CLC, District 4. Case 13–CA–185708

March 27, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE AND MCFERRAN

Upon a charge filed on October 5, 2016, by Communications Workers of America, AFL–CIO, CLC, District 4 (the Union), the General Counsel issued a complaint and notice of hearing on February 22, 2017, alleging that, since about September 23, 2016, AT&T Services (the Respondent) has been violating Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with certain requested information concerning the results of the Respondent's Technical Mechanical Tests (TMTs) administered to bargaining unit employees. Specifically, the Union requested that the Respondent provide the names, work location, current title, Net Credited Service, test date, and test result for all unit employees taking the TMT II test for the period of January 1, 2014, through implementation of the TMT III, and the same information for unit employees taking the TMT III test for the period of October 1, 2015, through the present. The Respondent filed an answer admitting in part and denying in part the complaint allegations, and raising certain affirmative defenses.

On June 16, 2017, the Respondent, the Union, and the General Counsel filed a joint motion to waive a hearing and a decision by an administrative law judge and to transfer this proceeding to the Board for a decision based on a stipulated record. On August 15, 2017, the Board granted the parties' joint motion. Thereafter, the General Counsel, the Respondent, and the Union each filed a brief, and the Respondent and the Union each filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation with an office and a place of business in Chicago, Illinois, has been engaged in the retail sale of home internet devices and related products. In conducting its business operations during the 12 month-period prior to the June 16, 2017 stipulation of facts, a representative period, the Respondent derived gross revenues in excess of $500,000 and purchased and received goods and services in excess of $5000 directly from points outside the State of Illinois. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative for bargaining unit employees who work in the Respondent's telephone operations in Indiana, Michigan, Ohio, Wisconsin, and Illinois. The parties' current collective-bargaining agreement, effective from April 12, 2015 through April 14, 2018, guarantees layoff protection to otherwise-qualified bargaining unit employees who pass the Respondent's Technical Mechanical Test ("TMT") or Technical Mechanical Test–Field ("TMTF").

In 2005, the Respondent concluded that the TMT and TMTF had been compromised by a local union affiliate and suspended their use.[3] As a result, the Respondent developed a replacement test, the TMT II and TMTF II. As with the TMT and TMTF, the Respondent administered the TMT II and TMTF II in a proctored environment using pencil and paper, where employees were required to put away personal belongings before taking the test and were observed throughout testing. Beginning in 2015, the Respondent decided to develop the TMT III and TMTF III to keep abreast of industry standards and attract the necessary pool of qualified job candidates. Instead of testing job knowledge, the TMT III and TMTF III would assess employees' general mechanical aptitude, personality, and overall job fit. And, in contrast to the previous versions of these tests, the TMT III and TMTF III would be administered unproctored, online at a loca-

[1] The Respondent labeled its brief answering the initial briefs of the General Counsel and Union as a "reply brief."

[2] Member Emanuel took no part in the consideration of this case.

[3] According to the Respondent, a member of its Human Resources Research Department was provided with a document that was substantially similar to one of the tests and was told that it had been confiscated from a represented employee, who said he had received it "from the union." The Union does not concede that its affiliate in fact compromised the test and recreated it.

tion of the employee's own choosing, utilizing computerized adaptive technology. To access the new tests, employees would enter their name and company email address. The TMT III and TMTF III were also structured so that, prior to accessing the TMT III and TMTF III, test takers would have to agree that they would not copy, post, record, videotape, distribute, upload, modify, or otherwise reproduce any portion of the test for any purpose.[4]

On about July 21, 2015, the Respondent informed the Union that it was implementing the TMT III and TMTF III. On July 30, 2015, after the Respondent answered several questions from the Union about the TMT III and TMTF III, Union Representative Ron Honse requested the pass rate of those who had taken the TMT II and TMTF II since January 1, 2014, and, in the future, quarterly reports with the pass rates for the TMT III and TMTF III. On August 19, 2015, Respondent Director of Labor Relations Stephen Hansen[5] responded that, even though the Respondent considered the test proprietary and needed to maintain its integrity, he would provide the pass rates for the TMT II and TMTF II since January 1, 2014, and for the TMT III and TMTF III for the four quarters following its implementation.

The Respondent implemented the TMT III and TMTF III at the end of August 2015. Since administering the new tests, neither the Respondent nor the developer of the TMT III and TMTF III has informed employees that their test results are confidential. However, as a matter of course, the Respondent does not share test results with the Union or other employees.

In the latter part of 2015, local union presidents notified Honse that fewer employees were passing the TMT III than the TMT II. On January 7, 2016,[6] in response to earlier union requests, Hansen provided the TMT III and TMTF III pass rates for October through December 2015, the first quarter following implementation of the revised test. On April 8, Honse broadened his request to include the names, titles, and work locations of all employees who took the TMT III. On April 13, Hansen provided the pass rate for January through March 2016, but did not break down the results by employee; instead, he expressed concerns that providing that information would jeopardize test confidentiality and requested that Honse explain the need for that information. On April 14, Honse notified Hansen that the TMT III appeared to be negatively impacting bargaining unit employees and that the Union needed the names and results to determine which employees should be included in a possible grievance and also to verify the accuracy of the Respondent's figures. On April 20, in declining to provide the requested information, Hansen stated that the Respondent is not challenging the relevancy of the information. Instead, he asserted that the requested information is confidential and that the Respondent "has offered an accommodation [by providing the pass rates] that balances the Union's need for the information with the [Respondent's] confidentiality interests." He asked that the Union propose some mechanism for verification that would not undermine the Respondent's confidentiality concerns. That same day, the Union responded that, although the requested information is presumptively relevant, it has explained to the Respondent the relevance of its request and that it will file an unfair labor practice charge if the Respondent refuses to provide the information.

On May 5, Hansen informed Honse of a possible mistake in the TMT II and TMT III pass rates that he previously provided, because they inadvertently included the results of employees in a different bargaining unit. On June 17, Hansen provided Honse revised pass rates that removed the results for the nonunit employees and for duplicate test takers. On June 22, Honse responded that "[i]n light of the errors in the information originally provided, and in an effort to validate the provided data, I am still requesting the names and work locations of those members tested and their results" as reflected in the pass rates previously supplied by the Respondent.

On July 28, Hansen offered to provide a list detailing the date and the result for each test taken with the test taker's name redacted, but added that the Union could opt to have the Respondent reveal the names of some of the test takers. In furtherance of its proposal, the Respondent supplied Honse with a list detailing the test dates and results for every TMT III and TMTF III administered by the Respondent for which data was available at that time. The Respondent redacted the names of the test takers. After Honse responded that he wanted to think over Hansen's proposal, Hansen reiterated the Respondent's concerns about confidentiality and security. Honse replied that he did not understand the Respondent's position because the Union sought neither a copy of the test nor the answers. On August 17, Honse informed Hansen that the Union was entitled to the information requested, but agreed "to accept information in the redacted format you have proposed with the ability to submit dates for cross checking with you." The Union also requested to receive the test results through at least December 2017. On August 31, Hansen clarified that the Respondent's

[4] Test takers must also acknowledge that the developer of the TMT III and TMTF III may use test data for research purposes after redacting identifying information.

[5] The parties stipulated that Hansen is a supervisor and agent of the Respondent within the meaning of Sec. 2(11) and (13) of the Act.

[6] All dates hereinafter are in 2016 unless otherwise indicated.

offer was not to allow the Union to submit dates for cross checking the results of all test takers on a specific date, but only to unredact two names on the quarterly list of test results, which it would provide through December 2016.

By written reply sent to Hansen on September 6, Honse recounted their past discussions over the replacement of the TMT II and TMTF II with the TMT III and TMTF III and repeated his request that the Respondent furnish the names, work location, current title, Net Credited Service, test date, and test results for all employees who took the TMT II for the periods of January 1, 2014 through implementation of the TMT III (TMT II Results), and the TMT III test for the period of October 1, 2015 through December 31, 2018 (TMT III Results).[7] He did not request any information about the content of the test. On September 23, Hansen responded that, despite his attempts at compromise, Honse continued to insist on expanding the Union's request by seeking to have the Respondent unredact more than two names each quarter and to receive the quarterly reports through December 31, 2018. Hansen renewed the Respondent's concerns that providing "the requested information could compromise the security, confidentiality, and integrity of the test." Hansen offered to provide the list of test results, with two names unredacted per quarter, through September 30, 2017. The Respondent has continued to provide quarterly pass rates, but not a list of the test takers' names and test results.

B. The Parties' Contentions

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with the information it requested to perform its duties as the exclusive collective-bargaining representative of the Respondent's bargaining unit employees. The General Counsel asserts that the information requested is relevant to bargaining unit employees' terms and conditions of employment because passing the TMT III protects them from layoff. The General Counsel states that the Union requested the information to determine whether to file a grievance over the replacement of the TMT II with the TMT III after suspecting that a higher proportion of bargaining unit employees were failing the revised test. Moreover, the General Counsel argues that the Respondent's claims of confidentiality to protect the security and integrity of the TMT III are baseless. At no time has the Union requested a copy of the test or the answers. Further, because the test is unproctored and may be taken at any location of the employee's choosing that has a computer, the Respondent's own processes make it possible for any individual to directly disseminate its contents. The General Counsel also points out that test takers are given no assurances that their results would be kept private, nor have test takers themselves requested that their results not be provided to the Union.

The Respondent contends that it has a legitimate and substantial confidentiality interest in maintaining the integrity of the TMT III—which includes the requested test-taker data, and that this interest outweighs the Union's right to the requested information. In addition to historically keeping the requested information confidential, the Respondent notes that it developed the TMT III at great expense and that, if compromised, it would be rendered ineffectual. The Respondent asserts that it offered the Union an accommodation that would meet the Union's needs while also protecting the integrity of the TMT III by providing redacted test results from which the Union could request two entries be unredacted for data verification. The Respondent also points to *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), in which the U.S. Supreme Court held that an employer had a legitimate interest in protecting the integrity of its employee test, which in that case justified the employer's refusal to provide certain testing information to the union. The Respondent avers that providing the Union with names and results of test takers puts at risk the integrity of the TMT III because the Union could interview those employees to reconstruct the content of the test.

The Union contends that it has demonstrated a strong interest in obtaining the requested information because it relates to the continued employment of bargaining unit employees at risk of layoff. The Union counters that the Respondent has not demonstrated that the substantial resources it devoted towards developing the test constitute a "legitimate and substantial" confidentiality interest that outweighs the bargaining unit employees' interest. The Union argues that *Detroit Edison*, above, relied on by the Respondent, turned on the employees' confidentiality interest in the results of a psychological aptitude test relating to sensitive personal employee information, not an employer's purported financial investment in the test. The Union notes that it has not sought and does not seek the test questions or answers, even though employees on their own could easily reproduce them because the test is unproctored, and that the Respondent provides no assurances to employees of confidentiality in their test results.

[7] Beginning with 2014, and for each successive quarter for which the Respondent provided employee pass rates to the Union, the Respondent notified the Union that no bargaining unit employees had taken the TMTF II or the TMTF III because the Respondent had not made any internal job postings for the prem tech position that required passage of the TMTF II or TMTF III.

C. Discussion

In *NLRB v. Acme Industrial Co.*, the U.S. Supreme Court stated that "[t]here can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties," including deciding whether to process a grievance. 385 U.S. 432, 435–436 (1967). Where the employer asserts that the requested information is confidential, the Board balances the union's need for the information against any legitimate and substantial confidentiality interests established by the employer. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991); *Washington Gas Light Co.*, 273 NLRB 116, 116 (1984). The party claiming confidentiality has the burden of proof. *Pennsylvania Power Co.*, above; *Washington Gas Light Co.*, above.

In this case, the information requested by the Union to assess whether to pursue a contractual grievance for bargaining unit employees is presumptively relevant. See *Allied Mechanical Services*, 332 NLRB 1600, 1601 (2001).[8] On the other hand, the Respondent asserts a confidentiality interest in protecting the integrity of its test, which it spent significant resources in developing, to measure employee aptitude and ensure that only qualified employees receive the contractual layoff protection.[9]

As the party asserting confidentiality, the Respondent bears the burden of proof. In the abstract, the Respondent has cited an indisputably important interest regarding its need to protect the integrity of its test. The Respondent notes that it has historically kept information about who has taken the TMT II and TMT III confidential out of concern that, once it reveals to the Union who took the TMT III, the Union could interview those individuals about the test questions to reconstruct the content of the TMT III. However, in practice, the Respondent has failed to demonstrate how the Union's information request implicates—much less imperils—that interest. Not only is its argument that the Union's information request could jeopardize the integrity of the test highly speculative, the Respondent's heightened concerns about the Union's potential use of the requested information are divorced from the reality of how it administers the TMT III. The TMT III is unproctored and taken on a computer at a location of the employee's choosing. The Respondent suggests that the protective measures it has implemented to safeguard the TMT III's integrity demonstrates the sincerity of its confidentiality concerns. The Respondent notes, for example, that it requires all test takers to agree not to disclose test questions and the test uses computer adaptive technology that rearranges the test questions, which makes recreating the test more difficult. But the Respondent has failed to explain how these protective measures would be less effective if the Union knows the employees who took the test.[10]

The Respondent's reliance on *Detroit Edison* is also unavailing. The Respondent correctly points out that *Detroit Edison* provides that an employer has a legitimate interest in protecting the integrity of an employee test. 440 U.S. at 315. However, in *Detroit Edison*, the Court considered the much narrower issue of whether the Board can order an employer to directly provide a union a copy of an employee test and the answer sheet. Here, in contrast, the Union is seeking the names and results of those unit employees who took the TMT III—not a copy of the TMT III—greatly reducing any potential risk to the Respondent's confidentiality interest. Moreover, with respect to the request for test results, in *Detroit Edison*, the employer assured test takers that their test scores would be confidential, and the prior disclosure of test scores resulted in the harassment of low scoring test takers who felt compelled to leave the employer. Id. at 319. These circumstances are not present here where assurances of confidentiality were neither requested nor given. Notably, the Court in *Detroit Edison* also implicitly recognized the right of the union to know the test takers' names so that it could seek their consent to obtain their test scores. Id. at 317.

Conversely, the Union explained that it needs the requested information to determine whether the change to the TMT III negatively impacted bargaining unit employees. The TMT III affects one of the most important aspects of the employer-employee relationship and employees' rights under their collective-bargaining agreement—whether the Respondent can put employees out of work by laying them off. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981) (order or

[8] We note that, although the Respondent disputed the relevance of the requested information in its August 19, 2015 correspondence with the Union, it stated explicitly that "[t]he Company is not challenging the relevance of the request" in an April 20, 2016 email to the Union. Moreover, in its answering brief to the Board, the Respondent stated that it "conceded from the start that the information requested is relevant."

[9] Although the Respondent stated in its September 23 response to the Union's information request that, in addition to its asserted confidentiality interest, it would be burdensome to compile the quarterly test result reports, the Respondent has not claimed burdensomeness in its statement of position or in its briefs to the Board.

[10] The Respondent does not specifically argue that it has any confidentiality concern with providing the requested information regarding the TMT II, which it last administered in 2015. In any event, we find that the Respondent has failed to raise a valid confidentiality concern with providing the names and test results of employees who took the TMT II from January 1, 2014 through the implementation of the TMT III or show how providing this information would in any way compromise the integrity of the TMT III.

succession of layoffs "are almost exclusively 'an aspect of the relationship' between employer and employee" that requires bargaining under the Act) (quoting *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)). More broadly, the employees also have an interest in ensuring that the Union is adequately policing the collective-bargaining agreement and protecting their rights. See *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 358 (D.C. Cir. 1983) ("[The] fundamental obligation to furnish relevant information is 'rooted in recognition that union access to such information can often prevent conflicts which hamper collective bargaining,' and it undoubtedly extends to data requested in order properly to administer and police a collective bargaining agreement.") (quoting *Florida Steel Corp. v. NLRB,* 601 F.2d 125, 129 (4th Cir. 1979)). Especially after the Respondent had initially provided erroneous pass rates, the Union reminded the Respondent that it needed the requested information to verify the accuracy of the Respondent's quarterly reports.[11]

Even if it had demonstrated a legitimate and substantial confidentiality interest, the Respondent has the burden of formulating a reasonable accommodation that addresses its concerns and the Union's need for the requested information. See *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004). The Respondent argues that the Union repeatedly rebuffed its efforts to reach an accommodation. It cites its offer to provide the Union a quarterly list of test results with the names of two of the test takers unredacted to allow the Union to verify the accuracy of the reported pass rates. However, this purported accommodation is demonstrably insufficient. For instance, in one quarter, 30 bargaining unit employees took the TMT III. With so many test takers, the Union would simply be unable to confirm that the Respondent accurately reported the pass rate if it could only verify two of the results. Instead, the Union informed the Respondent that it would accept a list of test results with the test takers' names redacted if it could submit dates for which the Respondent would reveal the names of all of the test takers. This would have increased the Union's ability to double-check the Respondent's reporting of the quarterly pass rates. The Respondent rejected that proposal.

In balancing the competing interests, the Respondent has not shown that providing the Union with the requested information would legitimately put at risk the integrity of its TMT III test. None of the limited evidence in the stipulated record supports the Respondent's claim that providing the requested information would genuinely put at risk the integrity of the TMT III. In sum, the Respondent has failed to prove that it has a legitimate and substantial confidentiality interest that outweighs the Union's need for the information. Accordingly, we find that, by failing and refusing to provide the Union with the requested information, the Respondent has violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing, since about September 23, 2016, to furnish the Union with the requested information, described above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall provide the Union with the information that it has to date failed and refused to provide that was requested by the Union in its September 6, 2016 information request to the Respondent, as described in this decision.

ORDER

The National Labor Relations Board orders that the Respondent, AT&T Services, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Communications Workers of America, AFL–CIO, CLC, District 4 (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

[11] The Respondent asserts that the Union does not need the names of bargaining unit employees affected by the implementation of the TMT III because the Union could file a grievance "for the good of the union." This fails to appreciate the benefit to the Union of discussing the matter with the affected bargaining unit employees prior to filing a grievance. The Respondent's approach would not allow the Union to ascertain such important factors as whether the unit employees who failed the TMT III have voluntarily left the Respondent, have been laid off by the Respondent, have considered or are in the process of retaking the TMT III, support the filing of a grievance, and other similar considerations. Moreover, the Respondent is in no position to instruct the Union how it should police the Respondent's adherence to the collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union in a timely manner the information requested by the Union on September 6, 2016.

(b) Within 14 days after service by the Region, post at its Chicago, Illinois facility copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 23, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 27, 2018

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Marvin E. Kaplan, Chairman

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the Communications Workers of America, AFL–CIO, CLC, District 4 (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL furnish to the Union in a timely manner the information requested by the Union on September 6, 2016.

AT&T SERVICES, INC.

The Board's decision can be found at www.nlrb.gov/case/13-CA-185708 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.